United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING

77-1450

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P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

WILLIAM LACEY,

Appellant

PETITION FOR REHEARING

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PETITION FOR REHEARING

STATEMENT

The Appellant petitions for rehearing pursuant to Rule 40 of the Federal Rules of Appellate Procedure. In the opinion of Appellant, the court overlooked a major point of Appellant's argument and, further, made a serious factual error in affirming the propriety of giving two Allen-type charges in the context of this case.

BRIEF STATEMENT OF FACTS

Appellant was charged in this action with possession with intent to distribute cocaine. The Prosecutor contended that the Appellant exacted six ounces of cocaine from three individuals who had smuggled the drugs into the Country by going to their apartment and threatening violence.

The government produced three major witnesses- the smugglers. Two of the prosecution witnesses, witnesses who the prosecution conceded were "not totally reliable", identified the Appellant. The defense attacked their testimony, inter alia, on the grounds that they had a strong motive to fabricate in the hopes of winning leniency since they had been facing life sentences on state charges. The third prosecution witness (who was present during the alleged theft of cocain) testified that the Appellant was not the individual who had taken the drugs.

The jury was unable to reach a verdict after two days of deliberation. Twice, it had sent notes to the Trial Judge indicating that it was hopelessly deadlocked. Twice, Judge Canella, sitting below, had read Allen-type charges to the jury. After indicating that he intended to declare a mistrial after the second day of deliberation, the Trial Judge changed his mind and ordered the jurors back for a third day. Shortly before noon of the third day, the jury convicted the Appellant.

An appeal was taken, and the decision was affirmed by this Court in a brief written opinion dated March 31, 1978.

ARGUMENT

THE COURT OF APPEALS OVERLOOKED A MATERIAL CONTENTION OF THE APPELLANT: WITHIN THE CONTEXT OF THIS CASE THE USE OF TWO ALLEN CHARGES WAS UNDULY COERCIVE.

The gravamen of this petition for rehearing lies in the third paragraph of the Circuit Court opinion.

> Appellant first contends that the two modified Allen charges given by the district court deprived him of a fair trial. However, a careful reading of the two charges indicates that neither was unfair or unduly coercive; and, in any case appellant's failure to object at trial precludes his raising this point on appeal.

The purpose of a Petition for Rehearing is to direct the Court's attention to a material matter of law or fact which it has overlooked in deciding a case and which would probably have brought about a different decision if considered. National Labor Relations Board v. Brown and Root, Inc., 206 F. 2d 73 (8th Cir. 1973). There is a serious factual error in the quoted passage, reflective of a legal error which, had it not occurred, would have mandated a reversal in this case. The defendant did, in fact, object most strenuously to the use of two Allen charges within the factual context of this case. As we shall

show, this factual error reflects underlying legal error on the part of the Court.[1]

It was the intent of Appellant to bring before the Court the factual context within which the Allen charge was twice used. (Appellant's Brief at 8, 11-13), an attempt which was apparently unsuccessful. This is discussed more fully later in this Petition.

The first time the jury reported to the Court that it was "hopelessly deadlocked" (Tr. 427 (6), 429 (15)) counsel for the defendant moved for a mistrial, noting that the issue was an extremely simple one. (Tr. 425). The Trial Judge agreed that the issue was a simple one (Tr. 425 (18)) but nonetheless determined to give an Allen charge. Defense counsel persisted in his objection and was given an exception. (Tr. 427 (13)).

In the late afternoon of the second day of deliberations the jury once again sent out a note informing the judge that it was impossible for them to reach a verdict. Counsel for defendant made his position completely clear:

> I think that any further Allen charge or any other charge similar to that, that...directs them to continue deliberating after a second note indicating their impossibility of reaching a verdict is in a way coercive with the simple issues involved. (Tr. 443 (15)).

Nonetheless, the Trial Court decided to give a second Allen - type charge. The Judge understood, however, that counsel had objected, and defendant was given an exception on the Court's ruling. (Tr. 444 (3), 446 (21)).

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[1] It appears that the Court considered only the wording of the charges and not the factual context within which the charges were given. Consideration of this factual context is necessary for the court to meet with standard of review necessary where the Allen charge is permitted. Powell v. United States; 297, F. 2d 318, 322 (5th Cir. 1962). See, also: United States v. Hynes, 424 F. 2d, 754,757 (2nd Cir. 1970); United States v. Robinson, 560 F. 2d 507,517 (2nd Cir. 1977) (en banc), cert. den. 46 U.S. L.W. 43 541 (Feb. 27, 1978).

Thus, this Court's opinion is factually incorrect. Objection was taken at Trial to the use of the Allen charges. It is true that no objection was taken to the wording alone of these charges, and it is to the limited issue of the wording of the charges that the Court seems to speak. The Court may have "read" the charge carefully, but it was not merely the propriety of the wording which Appellant sought to bring before the Court for review. It is the fact that these charges were given at all within the context of this case. (Appellant's brief at 8, 11-13).

Turning to the merits, the Appellant notes that this Circuit has recently placed itself into conflict with the Ninth Circuit on the issue of whether the giving of two Allen charges is per se improper. Compare: Robinson, supra (giving of two Allen charges not improper per se), with United States v. Seawell, 550 F. 2d 1159 (9th Cir. 1977) (giving of two Allen charges is unconstitutional per se).

Nevertheless, even in this circuit, where an Allen charge is given, a reviewing Court mu t make an individualized determination concerning whether the charges were coercive.[2] Robinson, supra, (560 F. 2d at 517). This individualized determination must not consider only the wording of the charge, but also the factual circumstances in which it was given. See: Jenkins v. U.S., 380 U.S. 445 (1964); Powell v. United States, 297 F. 2d 318, 322, (5th Cir. 1972); See, also: United States v. Haynes, 424 F. 2d 754, 575 (2nd Cir. 1970). Thus, it

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[2] Appellant should not be construed here as waiving any constitutional objections. Although it might be unrealistic to expect this circuit to changes its mind on an en banc decision that is less than one year old, appellant believes, as did the Ninth Circuit in Seawell, that two Allen charges in a criminal case are inherently destructive of the right to an impartial jury. Moreover, it should be noted that the Court in Robinson was apparently unaware of the decision in Seawell when it rendered its opinion. See: Robinson, 560 F. 2d at 525 (Oakes, J., dissenting). Appellants would be eager to amplify this argument in a supplemental brief if the Court chooses to examine the question. This question urgently requires expansive treatment by the highest possible authority.

is to the factual context that the Court should turn.

As noted earlier, it is of paramount importance to recognize that the issue given to the jury was an extremely simple one. The only evidence linking the defendant to a crime of any sort was the testimony of two government witnesses- Harvey Cohen and Marsha Brown. In essence it was not only the defendant who was on trial; it was equally the credibility of these two witnesses who the prosecution admitted were "not totally reliable and not completely upstanding, forthright pillars of the community". (Tr. 9 (4)). The Prosecutor was engaging in understatement,for both witnesses admitted that they had withheld information from the prosecution (e.g. Tr. 88 (6), 49 (12), 51 (5), 202-205,203 (10)), even admitted lying (e.g.(Tr. 50 (20-25),Tr. 81 (5-15), Tr. 90 (7-16), Tr. 93 (11)). Further, it was amply clear from the record that these witnesses were testifying in order to escape a lifetime prison sentence. (Tr. 48, Tr. 173-(12-22), Tr. 202 (23)). Against the testimony of these witnesses (whose credibility was suspect, to say the least) was a third prosecution witness who was eye witness to the transaction. This prosecution witness testified that he had been present during the transaction for approximately an hour (Tr. 291 (10)) and that defendant was not the individual who took cocaine from the government's other witnesses. (Tr. 292 (11), 293 (22)).[3]

Thus, in the context of the trial it was clear that the jury was faced with a relatively simple issue- were Brown and Cohen

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[3] This witness, a Mr. Pagliolonga, also gave a partial description of the individual involved in the transaction. He indicated that the individual appeared heavyset (Tr. 289 (5)) and that he did not have a beard. (Tr. 290 (20)). The transcript, of course, cannot indicate that the defendant, both at the time he was alleged to have been involved in this transaction, and at trial, and currently, has a beard and can only be described as "thin".

telling the truth.[4] The Court quite explicitly stated that the issue was a simple one. (Tr. 429 (23)). It was not the sort of issue where lengthy rational debate, rather than the pressure of seemingly endless deliberation was apt to change the mind of one or more conscientious jurors.[5] Belief in the truthfulness of contradicted statements by confessed criminals is rarely empirically provable or disaprovable. It was clear that one or more of the jurors, after examining the evidence against the credibility of Brown and Cohen, defended their reasonable doubt as to the veracity of the witnesses until the third day of deliberations.

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4 The prosecution complicated the issue by going into great detail, both at the trial and in its brief, regarding the conspiracy to bring cocaine into this country. In fact, there was not a single shred of evidence which indicated that the defendant had anything whatsoever to do with this conspiracy, and it was not the issue in the case. In fact, the Appellant had, in an earlier trial, been acquitted of having anything to do with such a conspiracy.

5 In 1949, Justice Udall of the Arizona Supreme Court described the reaction of a minority juror to the Allen charge:

> The majority think he is guilty; the Court thinks I ougth to agree with the majority so the Court must think he is guilty. While the Court did tell me not to surrender my conscientious convictions, he told me to doubt seriously the correctness of my own judgment. The Court was talking directly to me, since I am the one who is keeping everyone from going home. So I will just have to change my vote.

State v. Voeckell, 69 Arizona. 145, 157, 210 P. 2d 972, 980 (1949) (Udall, J., dissenting). Ten years later the Arizona Court accepted Udall's dissenting view and prohibited the Allen charge. State v. Thomas, 86 Ariz. 161, 342 P. 2d 197 (1959). Justice Udall's dissent is frequently cited for its accurate portrayal of a juror's dilemma. See, e.g., Commonwealth v. Rodriguez, 364 Mass. 87, 300 N.E. 2d 192 (1973) (Overruling the "original" Allen case Commonwealth v. Tuey, 9 Cush. 1,2-3, (Mass. 1851)).

Further, it must be recognized that the jury (not once, but) twice indicated that it was hopelessly deadlocked over this simple issue. Th initial jury instructions were quite clear. Yet the jury found itself unable to agree and several hours after beginning their deliberations informed the Trial Judge that they were "hopelessly deadlocked". The use of an Allen charge in such a context is, at best, questionable.[6] Yet even this is not the situation facing this Court. Despite being given the Allen charge, the jury still found themselves unable to agree.[7] They were sent home and were asked to begin again the next morning. This they did, but once again the jury apparently reached an impasse. Late in the afternoon

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Recent interpretations of the Fifth and Sixth amendments of the United States Constitution, have led at least one circuit court to wonder whether Allen "would not be decided differently today," United States v. Bailey, 468 F. 2d 652, 666 (5th Cir. 1972). Appellant believes that the Supreme Court would decide the case differently today. Indeed, three other circuits have prohibited all use of the charge, United States v. Thomas, 146 U.S. App. D.C. 101, 449 F. 2d 1177 (D.C. Cir. 1971); United States v. Fioravanti, 412 F. 2d 207 (3d Cir.) Cert. denied, sub nom Panaccione v. United States, 396 U.S. 837, 90 S. Ct. 97, 24 L. Ed. 2d 88 (1969); United States v. Brown, 411 F. 2d 930 (7th Cir. 1969), and a fourth circuit has prohibited repetition of the charge, United States v. Seawell, 550 F. 2d 1159 (9th Cir. 1977). At least twenty-three states have also banned the Allen charge, see: People v. Gainer, 19 Cal. 3d 835, 846 n.8, 566 P. 2d 997,139 Cal. Rptr. 861, 866 n. 8 (Cal. Sup. Ct., 1977) and cases cited therein.

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"By whatever label identified-the Allen charge, the dynamite charge, the third degree instruction, the shotgun instruction, or the nitroglycerin charge...The charge is used precisely because it works, because it can blast a verdict out of a jury otherwise unable to agree that a person is guilty." United States v. Bailey, 468 F. 2d 652, 666 (5th Cir. 1972).

of the second day of deliberations the jury sent out a second note to the judge indicating that they felt that they were unable to reach a verdict. This court has noted that the chances for coercion increase with each successive appeal by the Court for the jurors to reach a verdict. United States v. Robinson, supra, 560 F. 2d at 517. Other circuits have indicated that a second charge is so coercive that it breaches constitutional protection and should never be allowed. United States v. Seawell, supra. Yet, in spite of these coercive elements and despite the fact that a second Allan charge was clearly inappropriate under the circumstances outlined above, one was given. Moreover, the coerciveness of the second Allen charge was enhanced by the nature of the charge given. In United States v. Robinson, supra (a case with considerably more complex facts) the Court allowed a second charge, due in large part to its brevity and failure to mention any "need" to reach a verdict. United States v. Robinson at 517. Judge Bryan, the Trial Judge in Robinson gave a short two paragraph charge. In the instant case the Allen charge given by Judge Canella more than tripled that length. (Both Judge Bryan's charge and the charge of Judge Canella are set out in the Appendix to this Brief). In addition to generally being a harsher charge than that used in Robinson, Judge Canella's reference to retrial was totally inappropriate. See: Robinson, supra. The tone of that section of the charge (paragraph 6 of the charge set out in an Appendix to this Brief) clearly communicates a "need" for the jury to decide the case. Thus, the charge here, both in tone and context, is considerably more coercive than the charge given in Robinson.

Even after being given a second Allen charge, the jury deliberated for the rest of the day without reaching a verdict. Yet instead of calling a mistrial at this point, as the defense suggested, the Trial Judge asked the jurors to return for yet another day of deliberations.[8] The government argues that the fact that a verdict was not reached until the day after the second Allen charge was given supports the contention that the charge was not coercive. (Brief for the prosecution, at 17). Quite to the contrary, the fact that the jurors were recalled for yet a third day of deliberations, coupled with the second Allen charge, could not have failed to impress upon the jurors that a verdict would be demanded of them before their release.[9] Under these facts, then, one cannot conclude

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8 Both the Judge and the Prosecutor could not have failed to recognize that undue pressures would be placed upon the jury if forced to return a third day for deliberations. The Prosecutor indicated that he did not consider that the deliberations should extend beyond the second day (Tr. 443 (11)). The Judge flatly stated that he intended to dismiss the jurors at the end of the second day. (Tr. 443 (24)).

The government contends that recalling the jury for a third day of deliberations was justified on the ground that the "jury had sought additional evidence". Brief at 17. This contention is absurd when one realizes what the additional evidence consisted of. The jury wanted to compare the weight of the packages which had once contained cocaine. Thus ultimately turned out to be impossible because the contents of one of the packages had been remo-ed. (Tr. 446-449). Obviously, there is no way that this information could break a jury deadlock. A more likely explanation for the jury's request is that, having discussed the issue without movement towards a resolution, and having twice informed the Judge of this fact they had no more relevant matter to discuss.

9 The coercive nature of the this impression could only be still heightened by the realization on the part of Jewish jurors that Yom Kippur began at sundown that evening, at which time they would have to be at home. Under the circumstances, these jurors would also surely question whether the Judge might force them to return the following day (a day of religious observance) to deliberate.

other than that the jury was coerced into reaching its verdict.

It cannot be ignored that three Circuits and 23 states have eschewed the use of the Allen charge. See the cases cited in People v. Gainer, 19 Cal. 2d 835, 846 n.7,8, 566 P. 2d 997, 139 Cal. Reptr. 861 (1977). The A.B.A. Project on Minimum Standards for Criminal Justice (1968) has recommended its elimination (sec. 5.4-6) and even where it is allowed, it has been held that to give the charge twice is improper. United States v. Seawell, 550 F. 2d 1159 (9th Cir. 1977). A major rationale for its disavowal is that the use of the Allen charge places too great a burden upon the Appellate Courts in reviewing the circumstances in which it was used. See: United States v. Thomas, 449 F. 2d 1177, 1184-87 (D.C. Cir. 1971); People v. Gainer, 19 Cal. 3d 835, 843, 566 P. 2d 997, 139 Cal. Rptr. 861, 864 (Cal. Sup. Ct. 1977). Allen charge has been "a prolific generator of appellate controversy". In determining that the Allen charge would be permitted in the Second Circuit, this Court implicitly made the decision that it intends to meet this burden and determine the validity of an Allen charge based upon all the circumstances under which it is given. See: United States v. Robinson, supra. A cursory statement that the mere wording of the charge was not "unduly coercive" does not meet this self-imposed standard of review, particularly in light of the issue raised by the circumstnces surrounding the giving of this charge.

As shown above, unless the factual context in which the Allen charge was twice used is examined in its entirety, the only conclusion possible is that William Lacey's conviction should be reversed by this panel and remanded to the District Court for a new Trial.

CONCLUSION

A Petition for Rehearing is sparingly exercised. Here, the tradition assuring a fair and impartial jury result--free of nagging doubts--merits another consideration. The inconvenience to the administration of criminal justice is balanced against the danger of whittling a cherished, venerable commitment of our institutions. Finality is recognized, but the preservation of the jury system is one of our highest commitments.

This Court is respectfully urged to grant the Petition and reverse the judgment of conviction below.

Respectfully submitted,

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APPENDIX

Judge Bryan's charge, as quoted in the Robinson opinion at 512 follows:

> "the only response that I can give to that note is to state again for you some of what I stated yesterday afternoon, that is, you should examine the questions submitted to you with candor and with a proper regard for and deference to the opinions of one another; you should listen to one anothers' views with a disposition to be convinced.
>
> "That does not mean that you should give up any conscientious views that you hold, but it is your duty after full deliberation, to agree upon a verdict, if you can do so without violating your individual judgment and your individual conscience."

Compare Judge Canella's charge, reproduced below:

"Members of the jury, in analyzing how long you have been deliberating in this case this morning, I asked you to come here about 9:30 if you recall, but we actually didn't get started until about quarter after ten. Someone was delayed. I never ascertained why because I didn't think it was important. You then went out to lunch around one o'clock and you returned after two. When I got this note it was about 2:35. Actually you have not been out that long today. So I feel that you should continue to discuss this case with the hopes of coming up with a verdict that's in conformity with your convictions and your conscience. I am going to repeat what I said to you yesterday when you left, because of the interval in time, to refresh your recollection as to this particular area.

In the large portion of cases absolute certainty can not be expected, although the verdict must be the verdict of each individual juror and not mere acquiescence in the conclusion of others. Yet you should examine the question submitted with proper regard and deference to the opinion of each other and you should listen to each others opinion with a disposition to be convinced. It is your duty to decide the case if you can conscientiously do so.

If a much larger number of jurors favor conviction a dissenting juror should consider the reasonableness of his doubt when it makes no impression upon the mind of the other jurors equally intelligent and impartial and who have heard the same evidence.

If, upon the other hand, the majority favors acquittal, the minority should ask themselves whether they might not reasonably doubt the correctness of their judgment.

Likewise the jurors in the majority favoring the finding for either party should ask themselves whether they might not reasonably doubt the correctness of their judgment when it makes no impression upon the minds of the minority jurors, who, as I have indicated before, are equally intelligent and impartial and have heard the same evidence.

Should you fail to agree in this verdict that is not the end of the case. It may be retried. And any future jury must be selected in the same way you were selected from the same source of jurors that you have been selected and there is no reason to believe that the case would ever be submitted to twelve men and women who are more competent to decide it than you or that the case would be tried any better or exhaustively than it has been tried here or that there is any more or clearer evidence that could be produced on behalf of either side.

For that reason I suggest to you that you give it further consideration and I thank you for doing that as I have thanked you for what you have done in the past." (Tr. 444-46).